

1 PAUL B. SNYDER  
2 United States Bankruptcy Judge  
1717 Pacific Ave, Suite 2209  
3 Tacoma, WA 98402

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7 **June 20, 2007**

8 MARK L. HATCHER  
9 CLERK U.S. BANKRUPTCY COURT  
10 WESTERN DISTRICT OF WASHINGTON  
11 AT TACOMA  
12 \_\_\_\_\_ DEPUTY

13 **UNITED STATES BANKRUPTCY COURT  
14 WESTERN DISTRICT OF WASHINGTON AT TACOMA**

15 In re:

16 CARL VINCENT MASON and DONNA  
17 MARY MASON,

18 **Debtors.**  
19 WASHOUGAL DEVELOPMENT CORP., a  
Washington Corporation, and JACK C.D.  
LEE,

20 Plaintiffs,

21 v.  
22 CARL VINCENT MASON and DONNA  
23 MARY MASON,

24 Defendants.

25 Case No. 06-40672

Adversary No. 06-4145

**MEMORANDUM DECISION**

**NOT FOR PUBLICATION**

26 Trial in this matter was held on June 6, 2007. In accordance with the adversary  
27 complaint, Washougal Development Corp. and Jack C.D. Lee (Plaintiffs) seek to have the  
28 debt owed to them by Carl Vincent Mason and Donna Mary Mason (Defendants) declared  
29 nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (B), (a)(4), and (a)(6). At the  
30 commencement of the trial, the Court denied without prejudice the Defendants' motion to  
31 amend their answer to assert a counterclaim. The Defendants also asserted that the

32 **MEMORANDUM DECISION - 1**

1 doctrines of res judicata and/or collateral estoppel applied to this proceeding. The Court  
2 concludes that neither claim nor issue preclusion apply by virtue of the earlier arbitration  
3 decision, as the Defendants failed to establish that the arbitration hearing adjudicated issues,  
4 other than the amount of damages, raised by the Plaintiffs in their complaint before this Court.

5 There has been no evidence provided indicating that Donna Mason participated in the  
6 alleged fraudulent acts; accordingly, she is entitled to a directed verdict dismissing all claims  
7 against her.

8 Prior to the commencement of trial, the Plaintiff requested that the Court deem as  
9 admitted the Admissions contained in the Plaintiffs' First Discovery Requests to Defendants.  
10 No request was made by Defendants' counsel to withdraw the Admissions; accordingly,  
11 pursuant to Fed. R. Bankr. P. 7036, the Admissions contained in Plaintiffs' Exhibit P-18 are  
12 deemed admitted.

14 Based on the evidence, testimony and arguments presented at trial, the Court's  
15 findings of fact and conclusions of law are as follows:

16 **FINDINGS OF FACT**

18 The Plaintiffs and Carl Vincent Mason (Defendant) were engaged in the business of  
19 real estate development and financing. They commenced doing business together in 2001,  
20 through a limited liability company, WMDC, LLC (WMDC), and for several years engaged in a  
21 substantial number of joint ventures concerning the purchase, sale and development of real  
22 estate. Plaintiff Washougal Development Corporation and Defendant, through his wholly  
23 owned MDC-I, LLC (MDC-I), participated equally as members of WMDC. The managers of  
24 WMDC were both Plaintiff Jack C.D. Lee (Lee) and the Defendant. There is no indication in  
25 the record before this Court that Donna Mason was involved in any transaction with the

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1 Plaintiffs. On June 9, 2004, the parties agreed to two loans to MDC-I from WMDC (Loans),  
2 evidenced in the form of two promissory notes (Notes) in the amounts of \$270,000 and  
3 \$92,112.79. The Defendant executed the Notes as President of Madevco, Inc. (Madevco),  
4 another of Defendant's wholly owned entities whose license had previously expired in  
5 November, 2003. From the Notes it appears that Madevco was to provide collateral for the  
6 Loans within 30 days.

7 Despite Plaintiffs' demands for collateral, security was not provided by the Defendant.  
8 The required interest only Note payments were never made, and the Notes went immediately  
9 into default. Subsequently, the Plaintiffs brought an action in Clark County Superior Court to  
10 recover their monetary damage and for dissolution of WMDC. The Defendants  
11 counterclaimed. On Defendants' motion, the case was referred to arbitration, and WMDC was  
12 dissolved by an Arbitration Award dated November 9, 2005. The Arbitrator also awarded  
13 Plaintiffs \$510,933.24 against the Defendants (Judgment), which was affirmed on appeal.  
14 The Defendants filed the underlying Chapter 7 bankruptcy case on April 7, 2006. This  
15 Adversary Proceeding was timely filed seeking a judgment declaring the Judgment  
16 nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A) and (B), (4), and (6).  
17

## 18 CONCLUSIONS OF LAW

19 Creditors alleging nondischargeability under 11 U.S.C. § 523 have the burden of proof  
20 of each element by preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 287-  
21 288, 111 S. Ct. 654, 659-660 (1991).

### 23 **11 U.S.C. § 523(a)(2)(A)**

24 To establish nondischargeability under 11 U.S.C. § 523(a)(2)(A), a creditor must  
25 demonstrate by a preponderance of the evidence each of the following five elements:

1 " (1) misrepresentation, fraudulent omission, or deceptive conduct by the debtor;  
2 (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to  
3 deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and  
4 (5) damage to the creditor proximately caused by its reliance on the debtor's statement or  
5 conduct." Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d  
6 1081, 1085 (9th Cir. 2000) (citing American Express Travel Related Servs. Co. v. Hashemi (In  
7 re Hashemi), 104 F.3d 1122, 1125 (9th Cir. 1996); Citibank (South Dakota), N.A. v. Eashai (In  
8 re Eashai), 87 F.3d 1082, 1086 (9th Cir.1996)). A creditor need only justifiably rely on  
9 representations by a defendant. Field v. Mans, 516 U.S. 59, 74-5, 116 S. Ct. 437, 446 (1995).

11 Considering the evidence presented at trial, including the Admissions, the Loans were  
12 made to one corporation controlled by the Defendant, but the Notes were signed by a different  
13 corporation controlled by the Defendant, whose license was suspended at that time. The  
14 evidence and Admissions further establish that as of the date of the Loans, the Defendant  
15 was aware MDC-1 and Madevco did not have the present ability to repay or collateralize the  
16 Loans. The failure to repay the Notes gave rise to a breach of contract and the substantial  
17 judgment rendered by the Arbitrator in favor of the Plaintiffs.

18 The evidence presented by Exhibit P-13, however, acknowledges that the Plaintiffs  
19 were not looking only to the assets of the Defendant's companies for payment of the Notes,  
20 and as presented in Exhibits P-1 and P-2, the Notes did not require that the proceeds be used  
21 for any particular purpose, or that the collateralization or payment of the Notes be made by  
22 MDC-I. The Plaintiffs were also aware that the Defendant intermittently moved money around  
23 his several corporations as needed. (Exhibit P-13). The Defendant's testimony, supported by  
24 Exhibits P-13 and P-14, further indicates that the Defendant did attempt to provide security in

1 the middle of July, 2004, when the parties discussed a 22-unit apartment complex as  
2 providing a source of collateral, although for it to have worked would have required additional  
3 cash or collateral.

4 The Court finds credible the Defendant's testimony that although he did not have the  
5 assets in Madevco or MDC-1 currently available to make the Note payments or provide  
6 collateral, he had the requisite intent to make the Note payments and provide collateral as  
7 required in the future. There has been no evidence presented that the Defendant's other  
8 wholly controlled entities were insolvent. Additionally, it has not been established that at the  
9 time of the Loans, he would not have personally guaranteed the Notes or pledged what other  
10 assets he had available to make the Note payments or provide collateral.

11 The Plaintiffs had been doing business with the Defendant for several years and were  
12 aware of the Defendant's haphazard manner of conducting business. Nonetheless, Lee  
13 completely relied on the Defendant having the money and collateral available within 30 days  
14 without doing any investigation of the Defendant's assets or present ability to perform. Even a  
15 cursory investigation would have led to the conclusion that Madevco's license had expired.  
16 Furthermore, prior to entering into the Loans, the Plaintiff did not require as a condition of the  
17 Loans that the assets of the related Defendant's entities be pledged or the personal guarantee  
18 of the Defendant, notwithstanding that their business relationship had admittedly began to  
19 sour. No inquiry was made as to what collateral would be pledged, who would pledge it, or  
20 how the funds would be used. Lee is a sophisticated businessman. The Court concludes that  
21 the Plaintiffs' reliance on the Defendant's representations, without doing one iota of due  
22 diligence, was not justifiable in these circumstances. Further, the Court concludes that at the  
23  
24  
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1 time the Defendant entered into the Loans, he did not have the requisite fraudulent intent or  
2 an intent to deceive.

3 **11 U.S.C. § 523(a)(2)(B)**

4 The requirements for a creditor to establish a cause of action under 11 U.S.C.  
5 § 523(a)(2)(B) are use the of a written statement that is (1) materially false, (2) representing  
6 the debtor's financial condition, (3) upon which the creditor reasonably relied, and (4) that the  
7 debtor caused to be made with intent to deceive.

8 In the instant case, the Plaintiffs assert that the mere written statement that collateral  
9 would be furnished within 30 days satisfies these statutory requirements. The Court  
10 concludes, however, that the statement does not concern the Defendant's financial condition,  
11 only that collateral for the loans would be obtained within a 30-day period. Furthermore, the  
12 Defendant's testimony as to his intent is found to be credible, and the Plaintiff is not found to  
13 have reasonably relied on the Defendant's representations as more fully described above.  
14 The Court concludes that a preponderance of the evidence fails to establish that the  
15 Defendant had an intent to deceive at the time that the Defendant agreed to provide collateral,  
16 that a false written representation as to the Defendant's financial condition was made, or that  
17 the Plaintiff justifiably relied on representations made by the Defendant. Accordingly, the  
18 elements of § 523(a)(2)(B) have not been met.

20 **11 U.S.C. § 523(a)(4)**

21 11 U.S.C. § 523(a)(4) excepts from discharge any debt resulting from fraud or  
22 defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The broad general  
23 definition of a fiduciary—a relationship involving confidence, trust, and good faith—does not  
24 apply in the dischargeability context, thereby excluding ordinary commercial relationships from

1 the reach of § 523(a)(4). Lewis v. Short (In re Short), 818 F.2d 693, 695 (9th Cir. 1987).  
2 Implied or constructive trusts and trusts ex maleficio also do not create the fiduciary  
3 relationship required by § 523(a)(4). Short, 818 F.2d at 695. The required fiduciary  
4 relationship must arise from an express or technical trust that was imposed without reference  
5 to the wrongdoing that caused the debt. Scott v. Lewis (In re Lewis), 97 F.3d 1182, 1185 (9th  
6 Cir. 1996).

7 The evidence is clear, and the Plaintiffs did not argue that either a technical or statutory  
8 trust was created. Nor did the Plaintiffs cite to a statute that would provide for a technical trust  
9 in this situation. The only “fiduciary” language indicated by the Plaintiffs is contained in  
10 section 7.6 of the WMDC Limited Liability Company Agreement (Exhibit P-10). This contains  
11 general good faith language normally used in commercial business relationships concerning  
12 the obligation of both parties toward each other and to WMDC.

14 This language does not create a statutory, technical or express trust. Further, there is  
15 no indication that the Defendant breached this duty of good faith, other than possibly failing to  
16 provide security for the Loans. It can just as easily be said that the Plaintiffs would have  
17 breached this duty by not first investigating whether there was sufficient collateral to secure  
18 the Loans, before agreeing to the Loans. Accordingly, the Plaintiffs have not met their burden  
19 of proof on this cause of action as required by 11 U.S.C. § 523(a)(4).

21 **11 U.S.C. § 523(a)(6)**

22 11 U.S.C. § 523(a)(6) excepts from discharge debts resulting from “willful and malicious  
23 injury by the debtor to another entity or to the property of another entity.” What constitutes a  
24 “willful and malicious injury” has been clarified by the U.S. Supreme Court to mean a  
25 “deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.”

1 Kawaauhau v. Geiger (In re Geiger), 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998). The willful  
2 injury requirement "is met when it is shown either that the debtor had a subjective motive to  
3 inflict the injury or that the debtor believed that injury was substantially certain to occur as a  
4 result of his conduct." Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1208 (9th Cir. 2001).  
5 A malicious injury involves "(1) a wrongful act, (2) done intentionally, (3) which necessarily  
6 causes injury, and (4) is done without just cause or excuse." Jercich, 238 F.2d at 1209  
7 (quoting In re Bammer, 131 F.3d 788, 791 (9th Cir. 1997) (en banc) (quotations omitted)).  
8

9 For purposes of establishing the willful injury requirement, the Plaintiffs do not assert  
10 that the Defendant had a subjective motive to inflict injury. Even if the Court agreed that the  
11 Plaintiffs met their burden on the willful injury requirement, the Plaintiffs have not  
12 demonstrated by a preponderance of the evidence the *malicious* injury requirement. The  
13 evidence presented does not establish that the Defendant *intentionally* failed to provide  
14 security for the Loans with an intent to cause harm. The Plaintiffs have not met their burden  
15 of proof on this cause of action

16 This decision is not meant to condone the conduct of the Defendant. The arbitrator  
17 clearly found a breach of contract and awarded a substantial judgment in favor of the  
18 Plaintiffs. Such a finding by the arbitrator, however, does not satisfy the more rigorous  
19 requirements to establish nondischargeability of the Judgment.  
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21 DATED: June 20, 2007

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23 \_\_\_\_\_  
24 Paul B. Snyder  
25 U.S. Bankruptcy Judge